

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

11 Cr. 487 (RJS)

RONNIE GONZALEZ,

Defendant.

Resentenc

New York, N.Y.
February 15, 2023
11:15 a.m.

Before:

HON. RICHARD J. SULLIVAN,

Sitting by Designation

APPEARANCES

DAMIAN WILLIAMS

United States Attorney for the
Southern District of New York

BY: THANE RHEN

Assistant United States Attorney

DAVID PATTON

FEDERAL DEFENDERS OF NEW YORK

Attorney for Defendant

BY: MICHAEL ARTHUS

1 (Case called)

2 THE COURT: Good morning. I'll take appearances.
3 From the government.

4 MR. REHN: Good morning, your Honor. Thane Rehn
5 appearing for the United States.

6 THE COURT: Mr. Rehn, good morning.
7 For the defendant.

8 MR. ARTHUS: For Mr. Gonzalez, Michael Arthus for
9 Mr. Gonzalez.

10 THE COURT: Mr. Gonzalez, good morning to you. We
11 have some friends and family members here. So welcome. This
12 is a public courtroom. So everybody is welcome here. I know
13 your presence means a great deal to Mr. Gonzalez. So I thank
14 you for taking the time.

15 I'll try to make sure I explain everything that's
16 happening to you so that you can understand. This case has a
17 long history, which some of you may be aware of. We're going
18 to talk about that history and talk about the various
19 submissions that have been made to the Court in connection with
20 sentencing. But I'll try to make sure that we don't talk
21 through a lawyers' code so that you can understand what's
22 taking place. So thank you.

23 Some of you wrote letters. So I thank you for those
24 as well. It's always helpful to receive letters from people
25 who know an individual best. I have a long history with

1 Mr. Gonzalez going back over a decade now, but I don't claim to
2 know him best. There are other people who know him better. I
3 haven't seen him in many years.

4 I want to, first of all, go over with everybody what
5 I've received and reviewed in connection with sentencing. I've
6 reviewed all the sentencing materials that were submitted back
7 in 2013 or 2012 and 2013 for the first sentencing. I've also
8 reviewed the transcript of that sentencing and the judgment.

9 More recently, I have reviewed the sentencing
10 submission of the government which is dated February 1, which
11 is only three pages, single spaced, but it also includes the
12 prior submission which, again, I've already read.

13 And then I have the submission of February 8 from
14 defense counsel which 19 pages, single paced. And then it also
15 includes a number of attachments, including a letter from
16 Mr. Gonzalez.

17 I've reviewed all of those materials. Those materials
18 include some other letters as well as some other records dating
19 back to the '80s and '90s when Mr. Gonzalez was a student, just
20 a young kid. So I've read all of those materials.

21 The government hasn't responded to that letter; is
22 that correct?

23 MR. REHN: That's correct, your Honor.

24 THE COURT: So you're agreeing with the legal
25 analysis?

1 MR. REHN: No, your Honor. We're planning to address
2 that.

3 THE COURT: All right. I've also reviewed of course
4 the presentence report that was repaid by probation, which is a
5 revised presentence report. And I also got some updated
6 information about just the violations and programs and other
7 things that are alluded to in the defense letter. I got some
8 specifics that are not referenced in that letter. So I'll
9 mention that in a moment.

10 Is there anything else that I should be aware of or
11 that was submitted that I haven't mentioned?

12 MR. REHN: No, your Honor. I do want to make one
13 note, which is I received a phone call from chambers a few days
14 ago asking about whether the victims' family was going to be
15 here.

16 THE COURT: That was going to be my next question.
17 The family members of a victim have a right to be heard and
18 certainly a right to be notified of proceedings like this one.
19 So the victim in this case, Mr. Garcia, who was killed -- I
20 don't know whether his family members have been contacted about
21 this proceeding.

22 Have they?

23 MR. REHN: They have not, your Honor. We made
24 attempts to contact them. We don't have current contact
25 everything. Everybody who worked on this case at our office is

1 gone. Our current witness database doesn't have current
2 contact information, and we were unable to make contact with
3 them in advance of today's proceeding.

4 THE COURT: When did you start trying?

5 MR. REHN: I started trying after I received the call
6 from chambers.

7 THE COURT: That was a couple of days ago.

8 MR. REHN: That's correct, your Honor.

9 THE COURT: So there was no attempt to reach out to
10 family members prior to that?

11 MR. REHN: That's correct, your honor.

12 THE COURT: There's a federal statute that basically
13 requires this; right?

14 MR. REHN: Yes, your Honor. It was an oversight on my
15 part. And after receiving the inquiry from the Court, we
16 attempted to do what we could, based on the information we had,
17 and we were unable to do that this week.

18 THE COURT: The inquiry from chambers was to see if
19 anybody wanted to speak. But my assumption is that the
20 government understands its obligations and understands that
21 with respect to cases where there are victims, they understand
22 they need to reach out to those folks.

23 You're asking me to impose the same sentence as before
24 but the victims don't merit sort of consideration. I'm pretty
25 stunned by this. I'm not sure what to do, frankly. I'm not

1 sure whether I should be adjourning this -- Mr. Gonzalez's
2 family is here and rightly so. They have a right to be here
3 and want to be here.

4 I'm not sure whether Mr. Garcia's family wants to be
5 here, but they sure do have a right to be here. It doesn't
6 seem like a great effort was made to contact them. But for a
7 call from chambers to figure out whether anybody was going to
8 be here speaking, it sounds like no efforts at all would have
9 been made.

10 That is not the way this is supposed to go. There's
11 another sentencing next week involving a coconspirator. So it
12 seems to me that the efforts ought to be continuing, even if
13 you have not had success so far. In this day and age,
14 especially with all the resources that the government has, it
15 should not be that hard to find the family members of the young
16 man who was killed. He had family members. We know that.

17 What do you propose, Mr. Rehn?

18 MR. REHN: Your Honor, we did attempt to identify
19 whether we had any current contact information. We do not. I
20 don't know that the law requires additional efforts by the
21 government.

22 If the Court wants to instruct the government to
23 engage in additional efforts to attempt to contact the family
24 members --

25 THE COURT: You have to attempt to contact family

1 members.

2 Wouldn't you say? What do you think the law requires?

3 MR. REHN: I don't have a copy of the statute in front
4 of me, your Honor. But I believe generally speaking,
5 reasonable efforts to ensure that victims are aware of the
6 proceeding.

7 THE COURT: So what would efforts be in a case that
8 has been scheduled for months?

9 MR. REHN: Your Honor, I believe that given the age of
10 this proceeding, I don't know that the law requires more than
11 attempting, based on the information the government has as of
12 the time of the original prosecution, to identify the victims.
13 I don't know that there are any requirements for additional
14 investigative steps to determine whether those victims are
15 still around, whether they are able to participate in the
16 proceeding.

17 THE COURT: You made no effort to contact them at all;
18 right? Until what? A day ago? Two days ago?

19 MR. REHN: That's correct, your Honor. To be clear,
20 it's because we don't have the information that we would need
21 to be able to contact them and conduct additional investigative
22 steps to try to be able to find them. I don't believe the law
23 requires that. There are many cases where we're aware that
24 victims exist, but we don't necessarily undergo a new
25 investigation to find them at the time of a resentencing.

1 THE COURT: It's rare that somebody gets a new
2 sentence a decade later. That's an unusual set of facts. The
3 government has known about this sentencing for months.

4 Right?

5 MR. REHN: I believe the sentencing was scheduled in
6 the last fall. Yes, your Honor.

7 THE COURT: So there was ample time to figure out
8 whether the young man's family wishes to be heard.

9 Mr. Arthus, your thoughts on this?

10 MR. ARTHUS: I don't know that I can speak directly to
11 the government's efforts here. But I would just note for the
12 record that I believe the victim's family did not speak at the
13 initial sentencing. So that may also be a factor to be
14 considered here, for what that's worth.

15 We're prepared obviously to proceed today. We brought
16 his family in.

17 THE COURT: I'm just looking at the statute. Victims
18 have the right to be reasonably heard at any public proceeding
19 in the district court involving release, plea, sentencing, or
20 any parole proceeding. That includes the right to be treated
21 with fairness and with respect. And it also requires generally
22 that they be informed in a timely manner of proceedings.

23 So not ideal. Let's proceed, and I can see -- maybe
24 there will be other issues that come up along the way too. So
25 we'll see.

1 All right. The presentence report was prepared by the
2 probation department. That's done in all sentencings. In this
3 case, there was a revised presentence report.

4 Mr. Arthus, you've received a copy of the report. I
5 know you have because you've alluded it to it in your
6 submission.

7 Did you discuss it with your client?

8 MR. ARTHUS: Yes, we have.

9 THE COURT: You do have objections to what's in the
10 report. I know that.

11 MR. ARTHUS: Yes. We do.

12 THE COURT: So beyond the guidelines calculation
13 objections that are discussed at length in your letter, are
14 there any other objections that are not in the report or that
15 are sort of discreet factual objections?

16 MR. ARTHUS: Yes. I think everything has been
17 addressed at this point.

18 THE COURT: Let me just remind Mr. Gonzalez.

19 Mr. Gonzalez, when I told you when I sentenced you the
20 last time -- and I think I even told you before that -- there
21 are number of different factors that a judge has to consider
22 when fashioning a sentence.

23 One of those factors is the United States Sentencing
24 Guidelines. And that's, as I told you before, a big book.
25 This is the current version. It's a book that is about 500

1 pages long that is prepared by the United States Sentencing
2 Commission which is a group of kind of experts in the fields.
3 It's lawyers and judges who are tasked with helping to update
4 this book, which is designed to give guidance to judges like me
5 who have to impose sentences on individuals.

6 So the way it works is that for every crime or type of
7 crime, there's a chapter in this book, and the judge is
8 directed to go to that chapter and to make certain findings as
9 directed under the book. That book then assigns numbers or
10 values based on the type of crime and the characteristics of
11 that crime.

12 And so the judge goes through that process of adding
13 and, in some cases, subtracting points. The judge then comes
14 up with a number. That number is referred to as the offense
15 number.

16 The judge then does another calculation, based on
17 another chapter in this book, where there is a criminal
18 history. And not surprisingly, people who have prior
19 convictions, people who have previously been sentenced to
20 prison, they will typically be treated more harshly than
21 someone who is here for a first offense.

22 So the judge will go through the book, make findings
23 about whether there were prior convictions, if so, when they
24 were. And based on that, the judge then assigns points and
25 comes up with another number.

1 That number is referred to as the criminal history
2 category. There are six criminal history categories. Category
3 I is the lowest and least serious. category VI is the highest
4 and most serious.

5 The judge then has those two numbers that I talked
6 about, the offense level on the one hand, the criminal history
7 category on the other. And then, based on that, the judge then
8 goes the back of this book where there's a chart. It's kind of
9 like accounting really.

10 But there's a chart here that has the offense level
11 going down from 1 all the way down to 43 here on the left. And
12 then it's got the criminal histories going across from category
13 I all the way to category VI on the far right.

14 The judge basically goes down to the offense level,
15 goes over to the criminal history category, and where the
16 judge's finger finally stops on the chart, well, that is the
17 range that, in the view of the commission that prepared this
18 book, would be appropriate.

19 So it sounds pretty technical. It is pretty
20 technical. But it is important. It's something judges are
21 directed to do in virtually every case. So I will do that
22 here, recognizing -- I should mention that this book is not
23 mandatory. I'm not required to follow this book. I have to
24 make my findings. I have to announce what the range is, but
25 I'm free to go above or below the range as I deem appropriate.

1 There are other factors that I also will consider.
2 I'll mention those in a minute. But for now, we're going to
3 spend a little time talking about this book and how it applies
4 in this case because I think there are some disagreements
5 between the parties about it.

6 So I guess to boil it down to its essence, the
7 probation department and the government argues that the offense
8 level should be level 43 because this crime or these crimes,
9 which involved an attempt to commit a robbery and conspiracy to
10 commit robbery, resulted in a death, the murder of a young man.
11 He was the target of the robbery. He was killed during the
12 course of that robbery.

13 And so there's a section under the guidelines for
14 robbery that says if there was a murder, you then apply the
15 guidelines for murder which puts you all the way at the top of
16 the offense level at level 43.

17 So, Mr. Arthus, you have written a pretty lengthy
18 submission that I guess challenges both the probation
19 department's view of the guidelines and the government's which
20 is set forth in their letter. I think what might make sense is
21 to hear the government's response to your letter, and then I'll
22 give you a chance to certainly respond.

23 And we may go a couple of rounds on this. Let me just
24 say to the folks here this can be quite technical. That
25 doesn't mean it's not important. It might be a little tricky

1 to follow.

2 But we're going to be talking about prior cases.
3 We're going to be talking about the language in this book and
4 trying to make sure that at least I feel that I have enough
5 information and enough authority, based on precedence and based
6 on the language in this book, to make this determination. So
7 be ready for what is potentially a very technical conversation
8 but nonetheless an important one.

9 Mr. Gonzalez, if at any point, you've got any
10 questions, let me know. Okay? You're the main event here.
11 It's really public. I want to make sure your family
12 understands what's going on. Members of the public can come
13 in. I want to make sure they can understand what's going on.
14 But I mostly want to make sure that you understand what's going
15 on.

16 So if at any point you have difficulty following
17 what's taking place and you want me to just explain it or take
18 a minute so you can talk to your lawyer, that is perfectly
19 fine.

20 We're in no rush. This is a very important event in
21 your life. It's a very important day in the lives of a lot of
22 other people, including the people here, but others too. It's
23 a very important event in the life of the Court. There's
24 nothing I'm going to do today that's more important than this.
25 I can assure you.

1 So we're going to take as much time as we need. And
2 on occasion -- I'll just warn you. There are times when I will
3 put this over because I don't feel that I have enough
4 information or I feel that I need more time to reflect on what
5 with I heard.

6 I hope that won't be the case because folks took off
7 time to be here today. But that does sometimes happen, just so
8 you understand that's how important I take this and how
9 important this day is and this process is.

10 Let's hear from Mr. Rehn with respect to the
11 guidelines calculation and particularly the felony murder or
12 the murder cross-reference in 2B3.1.

13 MR. REHN: Certainly, your Honor. So I think by way
14 of background, as the Court is well aware, at the first
15 sentencing, the defendant was assigned the murder guideline.
16 There was no objection that at that time. There was no
17 objection on appeal. And we would first submit --

18 THE COURT: He was convicted Title 18 Section 924(j).

19 MR. REHN: That's correct, your Honor.

20 THE COURT: That had its own guideline. Right?

21 MR. REHN: They still had to apply the murder
22 reference to the guidelines, and there was no objection at that
23 time. I'm not sure if that necessarily constitutes a
24 forfeiture.

25 THE COURT: This is a new sentencing. So I don't know

1 that it would constitute a forfeiture.

2 MR. REHN: The purpose of the resentencing is to
3 resentence in light of the Supreme Court's decision in *Taylor*.

4 THE COURT: You don't think I can even consider what
5 he's been doing over the last ten years.

6 MR. REHN: Certainly the Court can consider --

7 THE COURT: Well, why would I be able to consider
8 that?

9 MR. REHN: -- that in 3553(a) factors. The argument
10 that's with regard to the application of the guidelines we
11 would submit are not warranted.

12 THE COURT: What's your basis for saying that? What
13 authority do you have?

14 MR. REHN: Well, the defense had every opportunity to
15 raise those objections.

16 THE COURT: No. No.

17 What's your basis for saying that have forfeited it?
18 Are you citing some cases?

19 MR. REHN: I'm citing the general principle of
20 forfeiture. Generally speaking, in the law, an argument not
21 raised in a proceeding where there is an opportunity to raise
22 it is deemed forfeited. I don't see a reason to depart from
23 that principle here.

24 THE COURT: And that principle applies on a
25 resentencing?

1 MR. REHN: Yes.

2 THE COURT: What authority have you got for that?

3 MR. REHN: I don't have a case that I can cite for you
4 for that.

5 THE COURT: I would say, generally, in my experience,
6 we do expect lawyers to cite cases. We expect them to be
7 responding to legal arguments and to respond in kind with legal
8 arguments.

9 I have to say, I look at your submission, and I'm not
10 sure I even need you hear because you seem to be relying just
11 on what was submitted ten years ago. I'm happy to hear what
12 you say, but you've had a week to respond to the Federal
13 Defenders' submission.

14 So you're relying on the general notion of forfeiture
15 with respect to whether they get to even challenge the
16 guidelines calculation, even though it's a new PSR.

17 What about the other arguments raised by Mr. Arthus?

18 MR. REHN: Sure. On the substance, the application of
19 the murder cross-reference is based on the fact that the murder
20 was foreseeable to the defendant and it was within the scope of
21 his agreement to commit this armed robbery. And a jury has
22 already found that.

23 And I think that certainly the legal basis for Count
24 Three has now been undermined by a subsequent development on an
25 unrelated area. But the jury's verdict is still controlling on

1 the factual issue of whether the defendant reasonably foresaw
2 the murder and whether the murder was within the scope of the
3 defendant's agreement.

4 I don't think the defense's characterization of the
5 Court's jury instructions at the trial is accurate. The jury
6 was instructed with respect to Count Three that it could base
7 the conviction for murder of the defendant.

8 It's a substantive murder charge, Count Three. And it
9 could be based either on the defendant's participation in the
10 conspiracy charged in Count One or in his participation in the
11 actual attempted robbery charged in Count Two.

12 As to the first, the Court instructed the jury on the
13 principles of conspiracy law, including that the act was
14 reasonably foreseeable to the defendant, and that's in the
15 context of the Count Three murder charge.

16 And I think the best way to read those charges is that
17 the jury had to find that the murder itself was reasonably
18 foreseeable to the defendant to convict the defendant on Count
19 Three.

20 Similarly, the Court instructed the jury on general
21 principles of aiding and abetting law with respect to basing
22 the Count Three murder conviction --

23 THE COURT: Getting back to the conspiracy, you've
24 talked about foreseeability. The main argument I think for
25 Mr. Arthus -- I'm not going to argue for him. He'll get a

1 chance -- was whether or not this was within the scope.

2 He seems to be construing that very narrowly to mean
3 that there had to have been a contemplation of the murder. I'm
4 not sure that that's accurate. But I don't think you've
5 addressed, so far, whether or not what transpired was within
6 the scope of the agreement.

7 MR. REHN: Yes. Well, that was also part of the
8 Court's conspiracy instructions when it was talking about the
9 Count Three murder charge, the within-the-scope language.

10 And it is well established that a killing in the
11 course of an armed robbery is in the scope of an agreement to
12 commit an armed robbery. The conspirators do not have to --

13 THE COURT: When you say it's "well established," what
14 are you referring to?

15 MR. REHN: Your Honor, I'm referring to the fact
16 that --

17 THE COURT: Are there cases?

18 MR. REHN: I don't have a particular case.

19 THE COURT: Why do you not have cases? I don't
20 understand that. What did you think we were going to do today?

21 He's citing cases. He's citing *Johnson*. He's citing
22 other cases.

23 MR. REHN: I'm happy to discuss *Johnson*.

24 THE COURT: You just said it's "well established."

25 What authority am I taking? Your vast experience --

1 MR. REHN: It's based on --

2 THE COURT: If I talk, you stop. Understood? It's
3 not that hard, it's not that complicated, and it's not a rule.

4 So are you telling me that it's well established based
5 on your experience or based on something else?

6 MR. REHN: The primary thing I would point to in this
7 case is the jury instructions that the jury was given in which
8 the jury was instructed that it had to find that this murder
9 was within the scope of the conspiracy and was reasonably
10 foreseeable to the defendant in order to convict, basing the
11 murder charge on Count One, the conspiracy.

12 THE COURT: I know what my instructions were. I'm
13 asking you what you're referring to when you say that it's well
14 established that a murder that takes place in the course of a
15 robbery is within the scope of the robbery.

16 So what are you referring to?

17 MR. REHN: The principle of --

18 THE COURT: "principle." I don't need your
19 editorializing on principles. I need authority.

20 MR. REHN: I don't take issue with the Court's legal
21 instructions. I don't think anybody did because the legal rule
22 is that a murder that is within the scope of an agreement to
23 commit an armed robbery can be, as it was in this case, charged
24 and found by a jury to have been part of what the defendant
25 agreed to and reasonably could have foreseen was an outcome of

1 the armed robbery in which he participated.

2 That aligns with the language in the guidelines. It
3 is the appropriate way to apply the guidelines in this case.

4 THE COURT: When you say it "aligns with the
5 guidelines," what are you referring to?

6 MR. REHN: The guidelines refer to a cross-reference
7 based on relevant conduct which includes --

8 THE COURT: Chapter 1?

9 MR. REHN: It's 1B1.3.

10 THE COURT: This is cited in Mr. Arthus' letter;
11 correct?

12 MR. REHN: That's correct. The language is cited on
13 page of the defendant's letter. It has the language in
14 subsection B there, the three elements: Within the scope of
15 the jointly undertaken criminal activity, in furtherance of,
16 and reasonably foreseeable.

17 And those were the elements that the jury was
18 instructed with in relationship to whether it could find the
19 defendant guilty of murder based on his participation in a
20 conspiracy to commit Hobbs Act robbery.

21 Now, what the defense has tried to do is to say that
22 there's some daylight between the conspiracy law and this
23 language, notwithstanding that the language is essentially the
24 same. And they primarily rely on this case of *United States v.*
25 *Johnson*.

1 But that case is clearly distinguishable because in
2 that case, the defendant was not convicted of a substantive
3 murder charge. The defendant was committed of a conspiracy to
4 commit extortion.

5 So there had to be a separate factual basis for
6 finding that the murder was within the scope of the defendant's
7 agreement to the conspiracy to commit extortion. The jury
8 hadn't been presented with that question.

9 Here, however, the jury was presented with that
10 question. The jury resolved that question. Even if the Court
11 were to conclude that, because on a separate legal issue the
12 Supreme Court has determined that Count Three is no longer
13 maintainable as a matter of law and therefore it does not need
14 to follow the jury's factual finding on that issue, the facts
15 at trial clearly supported that.

16 The defendant agreed to participate in an armed
17 robbery. He understood that guns would be used to perpetrate
18 the robbery. There is no question that they did not plan to
19 shoot the victims of the robbery.

20 But it was foreseeable that that was an outcome.
21 That's why the guns were brought to the robbery, because when
22 you're committing a robbery of a drug dealer, you understand
23 that there is a chance you may have to actually employ your
24 firearm and discharge your firearm in order to make the robbery
25 happen.

1 And that's exactly what foreseeably happened. The
2 defendant agreed to participate as a lookout as part of that
3 armed robbery. I think the jury's conclusion, the only
4 reasonable conclusion that can be based on this evidence, even
5 if the Court were not to feel bound by the jury's conclusion,
6 we would submit is binding as a matter of fact in this case.

7 THE COURT: Why don't we stop there.

8 Mr. Arthus, why don't you pick up there.

9 Just for the folks here, Mr. Gonzalez and his
10 coconspirator and codefendant, were convicted of the use of a
11 firearm that resulted in the death of another individual. That
12 count is a serious crime.

13 The Supreme Court has since directed that in cases
14 like this one where the underlying crime of violence was a
15 conspiracy or an attempt to commit a robbery, that that's not
16 sufficient to be a crime of violence under what's known as the,
17 "categorical approach," which requires that every conceivable
18 commission of the crime would involve the use of force or
19 violence. So it's a very technical distinction that the
20 Supreme Court made. But it has nonetheless resulted in Count
21 Three of the indictment being vacated.

22 But the jury did find, Mr. Arthus, that this was
23 within the scope; that it was in furtherance; and it was
24 foreseeable.

25 Would you agree with that? That's what the

1 instructions reflected. Correct?

2 MR. ARTHUS: So my reading of the instructions is that
3 they were given two different possible grounds for conviction,
4 either aiding and abetting or the Pinkerton conspiracy grounds.
5 I'm not sure its possible to determine here whether or not they
6 actually convicted on the Pinkerton grounds or on the aiding
7 and abetting grounds to determine what their factual basis was.

8 THE COURT: Assuming it were the Pinkerton, the
9 conspiracy grounds, that would be sufficient then for you?
10 That would end it?

11 MR. ARTHUS: No. I'm just addressing the fact of
12 whether or not it was necessarily on the conspiracy ground. In
13 fact, I want to emphasize the government's theory in their
14 summation, which was that Mr. Gonzalez -- and this is a
15 quote -- "aided and abetted Reed's and Johnson's possession,
16 use, and carrying of those guns because he helped them in
17 carrying out the robbery."

18 So the government's position on aiding and abetting in
19 its summation was not aiding and abetting a murder. It was
20 aiding and abetting an armed robbery.

21 THE COURT: Actually, it was aiding and abetting the
22 possession of a firearm. The underlying predicate was not an
23 aiding and abetting theory. I don't think there was any
24 argument that the robbery was aiding and abetting.

25 Do you agree?

1 MR. ARTHUS: What the government's position was was
2 that the aiding and abetting applied to the robbery count and
3 that the substantive crime that he was aiding and abetting was
4 possession of a firearm. But the government never explicitly
5 argued in their summation that what he was aiding and abetting
6 was an actual murder to the extent of --

7 THE COURT: Mr. Gonzalez was convicted of conspiracy
8 to commit robbery.

9 MR. ARTHUS: Yes.

10 THE COURT: This robbery.

11 MR. ARTHUS: Yes.

12 THE COURT: So the jury convicted him on that.

13 MR. ARTHUS: Yes. Absolutely.

14 THE COURT: So the aiding and abetting, it seems to
15 me, related to the possession of the firearm because
16 Mr. Gonzalez didn't possess the firearm, but others did.

17 MR. ARTHUS: Yes. I agree with that. It was the
18 aiding and abetting for Count Three.

19 THE COURT: But the instruction with respect to 924(j)
20 was that the firearm was going to be within the scope of the
21 underlying offense, which was a conspiracy to commit the
22 robbery, and then in furtherance and also foreseeable.

23 MR. ARTHUS: Yes. We're not contesting that he aided
24 and abetted possession of the gun. But for the murder
25 cross-reference to apply, what he has to aid and abet is the

1 actual commission of the murder, which under Rosemond would
2 require him to actually want or intend for the murder to take
3 place.

4 There is no question here that he aided and abetted
5 gun possession. When we did our robbery guidelines
6 calculations, we conceded that he would be subject to the bump
7 up for aiding and abetting.

8 THE COURT: So your theory is that somebody who agrees
9 to participate in a robbery, agrees that guns can be used, can
10 never be convicted or never can be sentenced under this
11 cross-reference, unless there was first a discussion in advance
12 about, we might have to kill somebody?

13 MR. ARTHUS: No. I think what this turns on -- and I
14 think this is a key point -- is the specific factual
15 circumstance of this case where the discussion of the robbery
16 that was put forward by Donnell Richardson was that this was a
17 robbery of unarmed individuals where no violence would be
18 necessary and where guns did not need to be used.

19 So that was Mr. Gonzalez's understanding of this
20 specific robbery, is that this was a robbery that although the
21 codefendants would be bringing guns, the understanding was that
22 the use of those guns would not be needed and that no violence
23 would be necessary.

24 And I think that puts this in a distinct factual
25 situation from other robberies that would fall under this

1 cross-reference where at least the contemplated use of -- the
2 use of weapons is at least contemplated.

3 THE COURT: So your view is that a robbery that
4 contemplates that guns will not be needed, but nonetheless they
5 bring them and they end up being used, falls outside of this
6 cross-reference?

7 MR. ARTHUS: In this situation, yes. It would fall
8 outside of this cross-reference because it would not meet the
9 aiding and abetting prong because, under those circumstances,
10 Mr. Gonzalez would not have wanted the guns to be used and
11 murder to be committed.

12 And that would bring it outside the scope of prong of
13 the conspiracy law because it's now outside of the scope of the
14 agreement, which is a robbery where guns will not need to be
15 used. So that's our position in terms of the jury instructions
16 and in terms of the applicability of the murder
17 cross-reference, of course which is discussed at much greater
18 length in the letter. I'm happy to go into more of the
19 argument from the sentencing submission, but I know the Court
20 has reviewed them.

21 THE COURT: I have.

22 Is there anything else you want to say in response to
23 Mr. Rehn's remarks?

24 MR. ARTHUS: Does the Court want me to respond to the
25 forfeiture prong?

1 THE COURT: Sure.

2 MR. ARTHUS: No guidelines calculation was made at the
3 original sentencing about robbery, about the attempted robbery
4 and the conspiracy to commit robbery, in terms of applicability
5 of a cross-reference, so this issue, as it applies to the
6 attempted robbery and the conspiracy counts, this was never
7 discussed at the original sentencing. So it couldn't be
8 forfeited because the original --

9 THE COURT: It was level 43 before. Right?

10 MR. ARTHUS: Yes. That was based on the 924(j). But
11 the 924(j) is gone. So defense counsel had no reason to
12 contest the applicability of any cross-references to the
13 robbery counts, which are now at issue, at the original
14 sentencing. So we can't forfeit an issue that was never even
15 ripe at the initial sentencing.

16 THE COURT: Mr. Rehn, do you want to respond?

17 MR. REHN: Your Honor, on the point about whether it
18 could have been based on conspiracy or aiding and abetting,
19 again, the count is not just a use and carrying a firearms
20 counts. It's the use and carrying a firearm causing the death
21 of a person count. So that's an element of the offense that
22 the jury necessarily had to find.

23 Defense has purported has a snippet from the
24 government's summation. But the overall proof at trial was
25 that the use and carrying of a firearm caused the death of a

1 person. And that was within what was, with respect to the
2 conspiracy charge, what was reasonably foreseeable within the
3 scope of the agreement to commit the armed robbery.

4 And then the alternative grounds would have been
5 aiding and abetting in connection with Count Two, the
6 substantive attempted Hobbs Act robbery charge, but even there,
7 with respect to aiding and abetting, that's an even stronger
8 basis for finding that the jury necessarily found that the
9 defendant would have understood that a murder would be
10 committed because aiding and abetting requires that that
11 defendant intend that that be a potential result of their
12 action.

13 So, again, because the death itself is an element of
14 Count Three, you can't escape that by saying he was just aiding
15 and abetting the carrying of a firearm. This is a case in
16 which the carrying of the firearms resulted in the death of a
17 person.

18 That was within the scope of the agreement. It was
19 reasonably foreseeable that that could happen as a result of
20 this robbery, and the defendant aided and abetted that robbery
21 and participated in it as a lookout during the robbery.

22 So he was factually guilty of having committed murder,
23 notwithstanding that we subsequently don't recognize these two
24 counts as a predicate for the murder charge. So we believe he
25 can't be convicted of that at this point.

1 But he's factually guilty. The jury found that. The
2 facts fully support that. so it's appropriate, when we look at
3 the exact same language in the sentencing guidelines, to apply
4 the murder cross-reference here.

5 THE COURT: Mr. Arthus, the last word.

6 MR. ARTHUS: Your Honor, I just need to respond to the
7 concept that he was factual guilty of having committed murder.
8 That is not what this situation was. He was factually guilty
9 of having committed or aiding and abetting gun possession
10 during which someone else committed murder.

11 Now, for a jury determination, that may be one
12 concept. But the guidelines are clear that sentencing
13 liability is supposed to be at least somewhat tied to someone's
14 real conduct and that the scope -- and as we explained in our
15 letter, the scope of sentencing liability is narrower than the
16 scope of conspiracy law.

17 Here, there is no question. I don't want it to seem
18 like I'm trying to minimize at all what happened here because
19 that is not the goal, and I just want to make that crystal
20 clear.

21 But the situation here is that the crime that he aided
22 and committed was Johnson's possession of a gun in which
23 Johnson killed someone else, and that is a unique factual
24 circumstance that does not fall within the sentencing
25 guidelines as presented.

1 I do want to make it clear that I'm not trying to
2 minimize at all. This is, as the Court said, a technical legal
3 argument, but it is an important one because it brings it
4 outside of the murder cross-reference.

5 THE COURT: I think that this is an interesting
6 question. I'd say ultimately I'm persuaded that level 43 is
7 the proper place to be. I think this case is very
8 distinguishable from Johnson.

9 The facts in that case involve an extortion that took
10 place over a long period of time and in a location where the
11 defendant in question wasn't even present. This is one that
12 took place in one location. Mr. Gonzalez was there, understood
13 guns were going to be used. Certainly the hope was that they
14 wouldn't have to use them, but the other coconspirators
15 wouldn't go forward without the gun. The testimony was clear
16 about that.

17 The jury was instructed about the scope of the robbery
18 conspiracy. They were instructed on whether or not the
19 shooting was in furtherance of and foreseeable in connection
20 with that shooting. I think clearly the jury's verdict
21 reflects that they were persuaded. I was certainly persuaded.

22 So on the basis of that, I am prepared to find that
23 the cross-reference does apply and that 43 is the base offense
24 level.

25 I will say -- I think this is an interesting and

1 somewhat technical argument. I don't know that it ultimately
2 matters that much. The facts are what they are. The role that
3 Mr. Gonzalez played I think was very clear.

4 How it fits within the technical parameters of the
5 guidelines, how it fits within the technical parameters of
6 924(j) and the statutes is interesting but ultimately is not
7 dispositive.

8 So I sentenced Mr. Gonzalez below the guidelines in
9 light of his actual role, which I thought made him less
10 culpable than Mr. Johnson, who did the shooting, or Mr. Reed
11 who insisted on bringing two guns to the robbery. But
12 nonetheless, I do think this guideline is appropriate.

13 But even if it were not, my sentence would be and will
14 be unaffected by that because I'm really focused on the actual
15 facts and what went on here and not categorical approaches and
16 not the hypotheticals that could be spun to fit the language of
17 the guideline or the language of the felony murder statute at
18 Section 1111 as referenced in the guidelines.

19 So that's my finding with respect to offense level.
20 So that puts us at level 43.

21 The criminal history category is category VI.

22 I don't think there are any dispute on that, is there,
23 Mr. Arthus?

24 MR. ARTHUS: No.

25 THE COURT: So it's a lengthy criminal history. It

1 goes back a long way beginning when Mr. Gonzalez was a
2 teenager. We'll talk more about the circumstances of his youth
3 in a moment, because those are relevant things to consider.

4 But certainly most of the criminal history that drives
5 him being in a criminal history category VI is more recent than
6 when he was a teenager. He has multiple prior felonies,
7 including multiple prior federal felonies. And he also
8 committed this offense while he was on supervised release. So
9 I think criminal history category VI almost doesn't capture the
10 criminal history of Mr. Gonzalez. But nonetheless, that's
11 where he is.

12 So based on a category of VI and an offense level of
13 43, the guidelines would call for a sentence of life. That's
14 what I found last time.

15 But there are other factors that have to be
16 considered. I mentioned this a minute ago, and I'll just
17 remind Mr. Gonzalez and explain to those who are here today who
18 maybe weren't here the last time, in addition to the sentencing
19 guidelines, which are purely advisory -- I don't have to follow
20 these -- there are other factors I have to consider.

21 Those factors include the facts and circumstances of
22 the offense. The guidelines talk about that a little bit. But
23 I have to look really at what actually happened here, what role
24 Mr. Gonzalez played, what role the other coconspirators played,
25 what was their motivation. I have to look carefully and make

1 sure that the sentence fits the crime.

2 I also have to look at the facts and circumstances of
3 the life of Mr. Gonzalez. Mr. Gonzalez is a unique individual.
4 He's different than anybody I've ever sentenced or will
5 sentence.

6 It's unusual that I'm sentencing someone again ten
7 years later. It's kind of the quirk of the Supreme Court
8 cases. But I think it's fair to say that Mr. Gonzalez is not
9 the same person today that he was ten years ago either.

10 People are not static. People are complicated.
11 People change. People move in directions, and they don't
12 always move in the same direction. They sometimes move
13 positively in some ways and negatively in other ways.

14 But I have to consider the whole history, the whole
15 person. I have to do what I can to understand the whole person
16 and to make sure that the sentence is tailored to that person.

17 I have to also consider the need for this sentence to
18 promote respect for the law and and for this sentence hopefully
19 to deter and discourage criminal conduct like this in the
20 future.

21 The hope is that the sentence that I impose will send
22 a message that others might learn of and consider. That's hard
23 to know. It's hard to know who will be aware of this sentence
24 and who will even think about it later.

25 But the hope is that somebody will maybe think twice

1 before robbing a group of drug dealers or bringing a gun to
2 that robbery. That's the hope. And the hope also is that
3 Mr. Gonzalez himself will, as a result of this sentence, never
4 again engage in this kind of criminal conduct, even though he
5 previously was sentenced multiple times and still returned to
6 criminal conduct. So I have to figure out what is the right
7 sentence is to send that message to him.

8 I also have to consider Mr. Gonzalez's needs while
9 he's in custody. And those needs change over time. Some
10 people have physical and medical needs, health needs that have
11 to be addressed. Some have mental health and substance abuse
12 treatment needs.

13 Some have the need just for an education or job
14 training or things that will enable them, when they get out, to
15 be productive and so that they don't ever slip back into
16 addiction or slip back into criminality as a way to make a
17 living.

18 So those are things that I have to take seriously and
19 I will take seriously. So I guess the point is there are lots
20 of different factors that a judge has to weigh and balance and
21 evaluate. No two cases are exactly alike. Every case is
22 unique because it's a unique individual, and the facts of a
23 case are unique, even though it might involve the same crime.

24 So the balancing is what the judge is charged with
25 doing. It's a hard thing to do. But it's something that I

1 certainly take seriously and most judges I know take very, very
2 seriously.

3 Mr. Gonzalez, we were here a decade ago. We talked
4 about these things. But there are some changed circumstances
5 since then. So Mr. Arthus discusses those quite a bit in his
6 sentencing submission. I want to hear more about that. I also
7 want to discuss some of the things that I've learned that I'm
8 not sure if the parties are aware of this or want to be heard
9 on it.

10 The letter that you wrote, Mr. Arthus, talks about the
11 work details that Mr. Gonzalez has been on. It talks about his
12 infractions while he's been in custody. It talks about his
13 education, the programs he's participated in for education.

14 You channel the sentencing reduction that took place
15 before Judge Broderick which took place several years ago. It
16 seems like there were some more recent infractions that you
17 didn't mention. I have a 2019 infraction.

18 Are you aware of that one?

19 MR. ARTHUS: Yes. That was considered.

20 THE COURT: That's possession of a dangerous weapon in
21 2019. And then there is an August of 2019 which was insolence
22 to the staff and unsanitary living space. In 2017, there was
23 also possession of a weapon, which was denied, but he was
24 nonetheless found liable for it.

25 And then there are additional infractions going back

1 to 2013 and 2012, which there were three that I'm aware of.
2 Three in 2013 and '12 and then one in 2011 which was accepting
3 money without authorization.

4 So the latter, the 2019s, seem more serious to me.
5 I'm not sure why they would be worth dismissing. I thought
6 your letter really was just focused on the 2013 ones.

7 MR. ARTHUS: I can just address that. That was
8 Judge Broderick's decision was in '21, if I remember right. It
9 was post those. That was why his reference had been that there
10 were only three infractions in the last seven years at that
11 time, now a little over nine years, and that there had been no
12 infractions in the prior now 3 1/2 years. So those were
13 considered by Judge Broderick.

14 THE COURT: The other thing I notice is that
15 Mr. Gonzalez has certainly -- he's been working pretty
16 consistently at various facilities where he's been assigned as
17 an orderly and other things. He's not working now where he's
18 been since October, but that might be excusable. It's the MDC
19 in Brooklyn. That's kind of a temporary thing.

20 In terms of his treatment, his participation in
21 educational programs and educational courses, it appears that
22 most of it, virtually all of it, is really from December 2019
23 until 2021.

24 In other words, it all postdates *Davis*. It all
25 postdates the prospect of potentially having the 924(j)

1 removed. He's been in prison for over a decade but didn't
2 really start taking any -- he took one program in 2017 for a
3 couple months. But otherwise, nothing starts until the very
4 end of 2019. So that was curious to me. I just want to make
5 sure I'm not missing something in terms of dates.

6 MR. ARTHUS: No, but I can address that very briefly.
7 That also postdates when he was transferred out of Big Sandy
8 and over to Victorville and then to Canaan. That was a large
9 hindrance to his ability to participate in programs.

10 There is limited programming offered at Big Sandy. It
11 often locks down because of huge securities concerns at that
12 facility. But he was enrolled, I believe, in the GED while he
13 was at Big Sandy, if I'm remembering earlier. So that's
14 something he started earlier. But that post 2019, that's also
15 when he was transferred out of Big Sandy.

16 THE COURT: Are you saying that Big Sandy does not
17 have educational programs?

18 MR. ARTHUS: No. What I'm saying is that because of
19 the constant violent conduct that occurs there, those programs
20 were repeatedly locking down during his time there.

21 THE COURT: But if he had enrolled, it would show. He
22 didn't enroll. It's not that he didn't finish. He didn't
23 enroll.

24 MR. ARTHUS: I get the point, your Honor. I'm
25 discussing this now. We had requested his records from the BOP

1 system from several months ago, back in September, and still to
2 this date have not received them. So I've been working off of
3 just a reentry plan.

4 THE COURT: I can order them.

5 MR. ARTHUS: Yes. I am just saying that I am
6 answering these questions, but I am working off of a reentry
7 plan. So the Court should just be aware of that.

8 THE COURT: Do you want an adjournment to get access
9 to those materials.

10 MR. ARTHUS: No. I think I can reference now the
11 changes and the growth and the rehabilitation.

12 THE COURT: I don't want to hamstring you. You can
13 talk about anything you want. Your letter didn't talk about
14 some of the things I mentioned. So they were on my mind.

15 MR. ARTHUS: That is partially a result of limited
16 records and partially because that was information that
17 Judge Broderick had had. So I was able to at least rely on
18 Judge Broderick's findings with regard to Alcoholics Anonymous
19 education courses, and GED courses, and efforts at
20 rehabilitation. So those were things that were before
21 Judge Broderick at the first resentencing that happened.

22 THE COURT: So the floor is yours. I'm happy to hear
23 from you.

24 MR. ARTHUS: So we're asking for a sentence of 110
25 months which we believe is sufficient but not greater than

1 necessary in this case. As the Court acknowledged -- I'll just
2 point out again he has a huge support, family support,
3 contingent here.

4 And I bring that up not just to show the family
5 support that he has but because one of the things that the
6 Court had emphasized at Mr. Gonzalez's initial sentencing was
7 that he should work to maintain relationships with his family,
8 in particular, with his daughters.

9 One of his daughters is actually here today. She
10 wrote a letter on his behalf. So that is something that he
11 did. He has maintained that family support. So I did want to
12 emphasize that.

13 In terms of Mr. Gonzalez's history and
14 characteristics -- and I'm not undermining what prior defense
15 counsel did and submitted, but we were able to get much more
16 information about Mr. Gonzalez's background, in particular, the
17 learning deficits and disabilities and issues that he went
18 through in his schooling and upbringing that were not
19 originally before the Court.

20 Mr. Gonzalez's parents, as the Court is aware, were
21 crack and heroin addicts. It appears that he was likely born
22 with drugs in his system that contributed to the learning
23 disabilities that he subsequently suffered from.

24 His father used to beat his mother in front of him.
25 When his father was gone, his mother used to beat him. He was

1 shuttled between homes. He lived in extreme poverty living
2 often resulting in him living on the streets.

3 And I think it's important to emphasize that school a
4 lot of times is a way that people get out of these situations.
5 But for Mr. Gonzalez, who suffered from learning disabilities,
6 school was not going to be the answer. His IQ was, at one
7 point, measured in the 60s, typically in the 70s.

8 He had psychological evaluations that showed severe
9 learning disabilities. At nine years old, he could barely
10 read. One of the reports actually says, this is a
11 nine-year-old boy who cannot read.

12 At 14 years old, he had a developmental age of six.
13 All along, he was suffering from untreated dyslexia that the
14 school had failed to recognize, doctors had failed to
15 recognize, and that was contributing to what was going on.

16 The school system, as you see in the records, was
17 unbelievably slow in finding proper placements for him. It was
18 not entirely the school's part. Part of it was that his mother
19 had stopped responding to letters and phone calls from the
20 school seeking for him to get proper placement.

21 It took years for him to get even basic services. And
22 by the time that intensive services had come about, he had
23 basically been just living on the streets at that point. This
24 is someone who, as a child, would constantly missed school.

25 He would show up unkept, unfed, and in pain and

1 terrified that his mother was about to abandon him. As a
2 teenager then, he was the victim of multiple shootings, one of
3 which left him paralyzed for a long time. Around the same
4 time, his mother died.

5 And he was sent to live with his grandmother where he
6 was physically beaten and tortured by aunts and uncles,
7 including being whipped with an extension cord while his
8 grandmother did nothing to stop it.

9 So from all that, unfortunately, the outcome was that
10 he fell into drug use, the same demon that followed his
11 parents. He fell into drug use. He became homeless. He began
12 living on the streets. He didn't even have shoes, and he
13 stopped going to school.

14 I don't offer this as obviously an excuse. I'm not
15 trying to excuse what happened here. Mr. Gonzalez certainly
16 has never tried to excuse what happened here. It is at least a
17 little bit of an explanation of how he fell into drug use.

18 In particular, I would point to the psychological
19 evaluations that showed that when he was young, this was
20 someone who had hammered into him, in the psychologist's
21 opinion, distrust, anxiety, anger, and fear of others.

22 And drugs turned out to be an easy escape. The Court
23 referenced his criminal record which is substantial. And a lot
24 of those crimes were drug related and were fed by that drug
25 activity.

1 Since the sentencing here, he has made substantial, we
2 would say substantial, efforts at rehabilitation. And I think
3 it's important to note that he was sentenced consecutive to
4 another case.

5 And we had no reason to think he was going to get out
6 of prison before he was in his 70s. He was sent to Big Sandy
7 initially for the first decade of his imprisonment. That was a
8 very violent institution. While he was there, he was actually
9 stabbed in the head and the face.

10 My understanding is that that final disciplinary
11 infraction the Court referenced, the possession of a weapon,
12 was shortly after or about the same time he had been stabbed in
13 the head, which gives some context to that disciplinary
14 infraction.

15 He took GED courses. He took educational courses.
16 We've gone through the steps he's taken while he's been in
17 prison.

18 THE COURT: What about the timing of it? Mr. Gonzalez
19 said and you said in your letter that he took some of the
20 things we discussed at sentencing to heart. And that seems
21 true with respect to maintaining relationships with his family.

22 One of the things that he was also talking about doing
23 was getting a GED and taking advantage of programs. That
24 hasn't happened. And the programs all seem to have been very
25 late-breaking.

1 They're really after the prospect of a sentencing
2 before Judge Broderick and after the prospect of a resentencing
3 under *Davis* and those cases. A cynic might suggest that that's
4 really the motivation. It's not something that predated the
5 prospect of preparing a narrative for sentencing.

6 MR. ARTHUS: Yes. Our understanding of the situation
7 is that it was very difficult getting into that programming at
8 Big Sandy and that he was -- as an individual who had a very
9 far off release date, a lot of this programming, particularly
10 drug programming, is keyed to someone's release date.

11 And people are not often able to get into those
12 programs until their release date approaches. But he made
13 efforts to get in any way. And particularly, even after 2019
14 when programs were locking down during COVID under the
15 conditions that he was going through, he still managed to
16 participate in those programs and still managed to take steps.

17 And his family spoke at length in their letters, or
18 spoke in their letters, about how he's had a changed outlook in
19 recent years. Sometimes people don't just, as the Court is
20 aware, change immediately. Sometimes it takes time and
21 experience.

22 Here, in this situation, I think that's what we're
23 seeing with Mr. Gonzalez. Particularly when you look at the
24 conditions that he's been incarcerated under, those are not
25 conditions that were contemplated by the guidelines, by

1 3553(a), or that the Court could possibly have been aware of
2 back when the sentencing occurred.

3 Not just the violence at Big Sandy but also the COVID
4 conditions that he endured, those go beyond normal prison time.
5 That's particularly hard time. During that time, he still
6 participated in programming and took steps towards
7 rehabilitation.

8 I do want to emphasize -- and obviously the Court is
9 not bound by what Judge Broderick said, but Judge Broderick did
10 indicate that he believed that efforts at rehabilitation had
11 taken place. So I do just want to emphasize that again.

12 I think something else that has happened here is that
13 Mr. Gonzalez has shown serious remorse and regret about this
14 incident. He submitted a letter to the Court. He didn't speak
15 at the first sentencing on his attorney's advice.

16 I'm not even going to try to summarize that letter
17 because I think he said it best. And I know the Court has
18 reviewed it. I don't want to trample on his words. But this
19 is someone who does feel serious regret about what has happened
20 here.

21 The Court recognized at the initial sentencing that
22 Mr. Gonzalez was the least culpable of the three individuals.

23 THE COURT: That was true when I sentenced him the
24 first time.

25 MR. ARTHUS: Yes.

1 THE COURT: It seems to me that the only things that
2 have changed are sort of relative to what Mr. Gonzalez has been
3 doing in the interim. It seems to me that the nature of the
4 offense obviously hasn't changed. The need to deter, the need
5 to promote respect for the law, all the other things under the
6 3553(a) factors, seem to be basically constant. Nothing has
7 changed for those. Right?

8 MR. ARTHUS: The reason I brought that up was to say
9 that when he is expressing remorse, I don't think there was
10 ever a question in the trial transcript that he did not want
11 this to happen, for what that's worth. And I think that is
12 consistent with the remorse he's shown.

13 THE COURT: I think it was pretty clear. I recall
14 there was trial testimony that he didn't want this to happen.
15 He had said as much to one of the witnesses; that he was
16 surprised and disappointed and frustrated that Johnson and Reed
17 went in guns blazing; that he didn't want that to happen. I
18 think that was true when I sentenced him the first time.

19 The expressions of remorse that are now in his letter,
20 that wasn't explicitly made the last time, but I had no reason
21 to think that he was remorseless. I didn't assume him to be
22 happy that it happened.

23 MR. ARTHUS: One other thing that has changed that I
24 do need to note here is that Reed is going to be resentenced
25 too, and Reed received a life sentence, which now is certainly

1 going to be lower. He's no longer eligible for a life sentence
2 now that the 924(j) count is gone. So our position is, in
3 terms of unwarranted sentencing disparities, if there's a
4 reduction in Reed's sentence --

5 THE COURT: Reed's top sentence would be 40 now.

6 MR. ARTHUS: 40 would be the top. If I remember
7 right, I believe he's requesting 20 and the government's
8 requesting 40 in that case.

9 So if Reed's sentence is reduced at the very least,
10 Mr. Gonzalez's sentence should be reduced too. Particularly
11 that the top count is now gone, he's no longer a career
12 offender. And he's actually served concurrent time.

13 He actually only has about 3 1/2 years of credit in on
14 this case. So in terms of the recidivism risk, even a
15 110-month sentence pulls him into basically his 50's, which
16 puts him at a decreased risk for recidivism.

17 But I would just conclude here by pointing out I think
18 the most telling fact about Mr. Gonzalez here is that he is not
19 requesting to be released today. In fact, he told me not to
20 make a time-served request or something to that because he is
21 someone who recognizes the gravity of the conduct he
22 participated in, because he is someone who has serious regret
23 and remorse.

24 And it's the situation. As the Court indicated,
25 sometimes people learn from their mistakes. Sometimes,

1 unfortunately, it takes someone's worst mistakes to lead them
2 to growth. So under the circumstances, we would say that a
3 110-month sentence is sufficient but not greater than necessary
4 in this case.

5 THE COURT: What that really means is 110 months with
6 credit for the time that he's already served that he's gotten
7 credit for. Right?

8 MR. ARTHUS: On this case. The other sentence has
9 ended already.

10 THE COURT: Right. So the 110 months would really
11 be more like 70.

12 MR. ARTHUS: I believe it's a little bit more than
13 seven more years at this point, which, considering he's been in
14 since 2010 on these cases, it's still a pretty hefty prison
15 term, all things considered.

16 THE COURT: Thank you, Mr. Arthus.

17 Let's hear from the government. I'll give you a
18 chance to respond if you'd like. Mr. Rehn.

19 MR. REHN: Yes, your Honor, just briefly. I think the
20 Court correctly identified that the really relevant
21 considerations for this resentencing are what, it if anything,
22 has changed since the initial sentencing that would be relevant
23 to a different result here.

24 I think there are a couple of reasons why the
25 arguments that the defense makes for such a drastic reduction

1 in the defendant's sentence are unwarranted. The first is, as
2 I think the Court has already noted, what the defendant has
3 done in the interim is not as one-sided as the defense has
4 presented to you.

5 There has also been some significant disciplinary
6 infractions while the defendant has been in custody which I
7 think warrant consideration on the opposite side of the ledger
8 relative to his rehabilitative efforts.

9 And then secondly, with respect to his rehabilitative
10 efforts, I think it's important to recognize that
11 Judge Broderick did already take those into account in reducing
12 his sentence by five years. So the defendant has actually
13 received some credit for that.

14 I think if you look back at the transcript from the
15 Court's initial sentencing, it was in the Court's mind that the
16 defendant would be in prison not just for the 30 years for
17 which he was sentenced but on top of the then existing 15-year
18 sentence for a total term of 45 years.

19 THE COURT: The real driver of that is not
20 Judge Broderick. It's that there were amendments to the
21 guidelines.

22 MR. REHN: That's correct, your Honor. But
23 Judge Broderick did take into account the rehabilitative
24 efforts as we've heard from defense counsel. And that was one
25 of the reasons why he chose to reduce the sentence in the way

1 that he did.

2 THE COURT: He sentenced below the guidelines both
3 times. Right?

4 MR. REHN: I believe that's right. Yes, your Honor.
5 And likewise, the Court here sentenced the defendant to the
6 below-guideline sentence, and the Court did that contemplating
7 that the defendant would have the opportunity to get out of
8 prison at some point in the future.

9 It's certainly heartening that at least in the last
10 couple of years, the defendant has taken advantage of some
11 rehabilitative opportunities in prison, but that's exactly what
12 the Court was hoping would happen under the sentence that the
13 Court deemed was appropriate at the time.

14 This isn't a case where there is some exceptional
15 change in circumstances that would warrant a departure from
16 what was appropriate at the time. It's certainly to be hoped
17 for that the defendant continues his rehabilitative efforts.

18 Under the sentence the Court originally imposed, he
19 still will expect to get out of prison in the future. those
20 rehabilitative efforts are calculated for that. But they're in
21 line with what the Court was hoping would happen when it
22 imposed its original sentence. It's not some unexpected
23 development that would warrant a different result here we would
24 submit.

25 So ultimately, when you calculate all of the factors

1 that were in the Court's mind as of the time of the initial
2 sentencing in determining that a 30-year sentence was
3 appropriate and, in particular, the seriousness of the criminal
4 conduct and the extreme seriousness of the defendant's criminal
5 history, the way in which the defendant has behaved in prison
6 is not a sufficient enough factor, in the government's view, to
7 warrant a departure from the Court's initial sentence.

8 THE COURT: I don't think you addressed the disparity
9 argument that Mr. Arthus has made.

10 MR. REHN: Yes, your Honor. The government has taken
11 a position that Mr. Reed should be resentenced to a sentence of
12 40 years. So Mr. Gonzalez would still receive a lower sentence
13 than Mr. Reed did.

14 THE COURT: It would be relatively less. Mr. Reed was
15 given a life sentence. Mr. Johnson was given a 40-year
16 sentence.

17 MR. REHN: That's correct, your Honor. That sentence
18 would still be available to Mr. Johnson.

19 THE COURT: It's not clear what's going to happen to
20 Mr. Johnson because he's still --

21 MR. REHN: But in the event that he were to prevail on
22 his application for resentencing, the Court's original sentence
23 would be available to him.

24 I think that a sentence that's consistent with the
25 Court's original sentence here would still preserve the Court's

1 recognition of this defendant's reduced role relative to his
2 codefendants. And I think the happenstance that another
3 codefendant's potential maximum sentence has been reduced
4 shouldn't change the result in this case.

5 THE COURT: All right. Thank you.

6 Mr. Arthus, is there anything you would like to say in
7 response?

8 MR. ARTHUS: I would just like a second to speak to
9 Mr. Gonzalez briefly.

10 THE COURT: Okay.

11 (Defendant and counsel conferred)

12 MR. ARTHUS: The only final thing I would add -- this
13 isn't based on my conversation with Mr. Gonzalez -- but that I
14 forgot to address was that the sentence in place right now on
15 the robbery count is 20 years concurrent. So effectively, the
16 government's request is that those sentences be increased to
17 run consecutive. The government's position had been that the
18 Supreme Court -- I believe they worded it was expected or
19 predict that people would receive higher sentences.

20 THE COURT: It was "contemplated."

21 MR. ARTHUS: It was contemplated as a possibility.
22 But I don't think that these circumstances warrant increasing
23 the sentence in that respect by running them consecutively.
24 But other than that, I would rest on our sentencing submission.

25 THE COURT: All right. Thank you.

1 Do you want to respond to that, Mr. Rehn?

2 MR. REHN: It's addressed that in our written
3 submission. The issue is that the Supreme Court contemplated
4 that people would not receive lighter sentences in many of
5 these cases. And certainly this is a case that I think fits
6 within what the Supreme Court expected.

7 THE COURT: It's hard to know what the Supreme Court
8 had in mind exactly. But the reality is a lot of people have
9 gotten huge windfalls as a result of their decision related to
10 the categorical approach.

11 This is a situation where there is flexibility; that
12 courts that do believe the that originally imposed sentence is
13 still appropriate, can structure it differently to get to the
14 same place. I don't think there is any question that I have
15 that discretion. Ultimately, that's something I'm prepared to
16 do.

17 The last time I imposed sentence, I wasn't rigidly
18 following the guidelines. I think I explained the nuanced
19 approach that was being taken with respect to all of the
20 conduct and all of the other factors under 3553(a). So I think
21 there's no dispute about what discretion I have and what
22 authority I have. Whether I exercise it is up to me obviously.

23 So, Mr. Gonzalez, you wrote me a letter. It was a
24 very thoughtful letter. Thank you for that. You have a right
25 to address the Court now if you'd like. You're not required

1 to. But you certainly have a right to. If that's something
2 you'd like to do, certainly I'm happy to hear from you.

3 THE DEFENDANT: Yes. I want to do it, but very short
4 because I stutter a lot, and I don't want to get caught up in
5 my words. I want to say I apologize to the victim's family. I
6 apologize to my family. I know I committed a crime. I'm here
7 today asking for leniency to give me another chance in society
8 so I can be productive for my family.

9 THE COURT: Thank you.

10 THE DEFENDANT: You're welcome.

11 THE COURT: We've been at this for over an hour. What
12 I'd like to do, if it's okay with everybody, is take a short
13 break so I can collect my thoughts. I can reflect on what I've
14 heard from Mr. Gonzalez, from the lawyers.

15 I can then just also reconsider some of the things
16 that I had in my mind when I walked in here, but I always want
17 to make sure that I'm open to learning new information that
18 might be relevant to a sentence. So ten minutes tops.

19 Then we'll come in. At that point, then I will
20 announce the sentence that I intend to impose. I will explain
21 my reasons for it. I will then check with the lawyers to make
22 sure there is nothing illegal or improper in that sentence. If
23 not, then I will formally impose the sentence. So I don't
24 think it will take too much longer, but I think a ten-minute
25 break would be appropriate. So thank you.

1 (Recess)

2 THE COURT: Have a seat. Thank you.

3 Let me state the sentence that I intend to impose and
4 explain my reasons for it.

5 Mr. Gonzalez, I mentioned all of the factors that I
6 have to consider. Most of those factors are unchanged from
7 where they are a decade ago. The fact is that a young man was
8 killed.

9 The fact is that you were engaged in a robbery
10 conspiracy that caused that; that you were also involved in
11 other criminal activity that led to this sentence being
12 consecutive to a then 15-year sentence imposed in another case;
13 that your criminal history was very, very lengthy then. None
14 of that has changed. That's all still true.

15 Your role in that offense was less than Reed's, and it
16 was less than Johnson's in the sense that you didn't carry
17 guns. You didn't fire the guns. Nonetheless, you were in on
18 the deal.

19 I think, in some ways, Mr. Arthus' submission, though
20 excellent, does I think understate your role. You were at the
21 planning meetings. You knew what was going on. You were
22 there. You were in.

23 I'm not saying that you wanted somebody to get killed,
24 but you certainly helped set in motion a series of events that
25 did result in someone getting killed, a really young man. Who

1 knows what he might have been.

2 His family is not here, but his family is also never
3 able to see him, even from a distance, even through letters or
4 phone calls. So he's been taken from them. Who knows what he
5 might have become in time.

6 So the seriousness of the crime, the length of the
7 criminal history, the nature of the offense and your role in
8 it, I think all of that remains the same. What has changed is
9 you. You've changed. We all change. Nobody is static, as I
10 said.

11 In your case, I think there have been some positive
12 developments. I think it's good that you've been working at
13 the facilities that you've been in. I think it's good that
14 you've maintained relationships with your family, including
15 your daughter who wrote a very thoughtful letter.

16 That's all good. It carries its own benefits. There
17 are things that come from doing that that are obviously
18 beneficial in their own right. But still, it speaks well of
19 you that you have maintained relationships and that you have
20 worked while you've been in custody.

21 You have also taken some recent steps to get some
22 skills and to get some education. Most of it is pretty recent.
23 And I think this case that is distinguishable from one of the
24 cases that Mr. Arthus talked about. I Shea Douglas was a guy I
25 sentenced to time served after he was being resentenced in

1 light of a resentencing much like this one.

2 He wasn't serving as long a sentence. But he in the
3 meantime, had gotten his GED and taken some college courses and
4 really turned his life around in a very profound way.

5 You've done some very positive things. I don't mean
6 to minimize it. But I think that yours don't compare with
7 Mr. Douglas', and yours are mostly pretty recent. The programs
8 you're participating in are pretty short -- ten hours here, ten
9 hours there, two hours, two hours, four hours. when you were
10 at Ray Brook back in 2004, you were part of a GED program that
11 had you commit over a thousand hours from what I've seen.

12 So there are different levels of commitment. What
13 you've done so far is a step in the right direction, and I want
14 to give you credit for it because I think it's important.

15 So the question for me is what is appropriate. What
16 is the appropriate sentence. The government has urged me to
17 impose the same sentence to send the same message. I get that.
18 I understand that.

19 I don't think I want to do anything to suggest that
20 this was not a serious crime or that it's not as relevant today
21 as it was ten years ago. A young man was killed in a violent
22 crime that took place in an apartment building in Hunts Point,
23 a poor area of poor people just trying to do their best, just
24 trying to raise their family, go to school, go to work. This
25 took place in broad daylight in the lobby of a building where

1 lots of people lived.

2 You were the lookout when these other guys went
3 charging in there with guns. Who knows what could have
4 happened, what might have happened, involving not just the
5 targets, but innocent bystanders, kids. So it was a brazen,
6 brazen crime. And it wasn't your first rodeo. You'd been
7 previously convicted of very serious crimes.

8 So I think my sentence here is not going to be
9 drastically different from what it was last time. But I think
10 I have to do something that gives you credit and encourages you
11 to keep doing what you're doing. So what is the right
12 sentence.

13 I'm prepared, in light of the positive things you've
14 done, minus some of the negative things -- you've got some
15 infractions that are not great, an infraction involving a
16 weapon, an infraction involving other things that had you lose
17 good-time credit or get put in the special housing unit. I
18 know it's tough to be in prison. I know there are some things
19 that are beyond your control, but you've had more infractions
20 than some that I sentence on resentencings.

21 So ultimately at the end of the day, I'm prepared to
22 come down four years. That's four years of your life that
23 you're going to get back. Coupled with the five years that
24 Judge Broderick gave you back, that's a nine-year reduction
25 from where you were a decade ago.

1 It's still a long sentence, but it's one that I think
2 is warranted in light of the seriousness of the crime, the
3 seriousness of the criminal history, and all of the other
4 factors that I mentioned.

5 There is also a term of supervised release that I'm
6 going to impose. That will be three years to run concurrent to
7 both counts. That will have conditions that I'll recite in a
8 minute. They won't be terribly different from what they were
9 the last time.

10 Let me just check with the lawyers.

11 Does the government know of any legal impediment to my
12 imposing that sentence?

13 MR. REHN: No.

14 THE COURT: Mr. Arthus?

15 MR. ARTHUS: No.

16 THE COURT: Let me ask you to please rise,
17 Mr. Gonzalez.

18 Mr. Gonzalez, having presided over the trial in which
19 the jury found you guilty of the two counts that still remain,
20 I sentence you to a term of imprisonment of 26 years. That is
21 basically consecutive to Judge Broderick's sentence, but you'll
22 get credit now for the time that you've already earned on this
23 sentence. So I guess I'll have to do the math on that.

24 Mr. Arthus, do you have any recommendations as to how
25 to do that? There is no consecutive to do at this point.

1 Right?

2 MR. ARTHUS: Yes. There is no consecutive. The other
3 sentence is completed at this point.

4 THE COURT: So I guess it will be 26, minus the time
5 he's already served, gotten credit for, on this sentence.

6 Right?

7 MR. ARTHUS: Yes.

8 THE COURT: So that is the sentence. I'll do the math
9 in terms of months.

10 Do you know what, in term of months, that he's been
11 given credit for?

12 MR. ARTHUS: Not exactly. It's approximately 3 1/3
13 years. It may be actually slightly more than that.

14 THE COURT: You can send me something. I can check
15 with probation and the Bureau of Prisons. But I'll hold off on
16 docketing the final judgment until I've heard from you.

17 MR. ARTHUS: I'll reach out to BOP.

18 THE COURT: Because that will matter. So that's the
19 sentence. It's to run concurrent on both counts, to be
20 followed then by a term of supervised release of three years,
21 also to run concurrent on both counts.

22 That term of supervised release will have conditions,
23 as you know, similar to what I imposed last time. Those
24 conditions include some mandatory conditions, that you not
25 commit another federal, state, or local crime.

1 That you not use or possess a firearm or narcotics of
2 any kind.

3 There are standard conditions. Those will include --
4 there are 12 of those in all. I'm going to impose all 12.
5 They're in the presentence report. I won't repeat them unless
6 you want me to.

7 There are some special conditions that I'll recite now
8 on the record. They include that you'll participate in an
9 outpatient drug treatment program approved by the probation
10 office will include testing to determine whether you've used
11 any kind of drugs or alcohol without permission.

12 You will contribute to the costs of that program if
13 you can afford it. If you can't afford it, then I will have
14 probation absorb that cost. But if you're working, if you have
15 access to insurance, I'll ask that you help defray the cost of
16 that.

17 You will submit your person, your residence, your
18 place of business, your vehicle, your property, your computers
19 or offense or other devices to a search in the event that the
20 probation office believes there may be evidence of a crime or
21 evidence of a violation of the terms of your supervised
22 release. That's not negotiable. You have to submit to that
23 search when requested.

24 You have an obligation to tell others with whom you
25 resider or with whom you share these premises that are subject

1 to this search so they can take steps to protect their own
2 property and their own privacy.

3 You will participate in vocational and educational
4 courses as needed to make sure that you're able to get legal
5 employment that will allow you to support yourself and your
6 family.

7 I think that's it for the special conditions. There's
8 a special condition of \$200. That was imposed last time. I
9 will impose that again.

10 There was no restitution last time and no fine. I'm
11 not going to impose that now either.

12 MR. ARTHUS: We'll address the special assessment.
13 He's already satisfied it. Actually I think with the 924(j)
14 being vacated, I think he's actually entitled to \$100.

15 THE COURT: If that's the case, then whatever he's
16 paid over the \$200 should go to him.

17 To his commissary account? Is that where he wants it?

18 MR. ARTHUS: Yes, and I think that probably needs to
19 be on the judgment.

20 THE COURT: Why don't you get back to me on that too
21 so I use language that is appropriate because that's \$100 that
22 would be valuable in prison.

23 I should tell you, Mr. Gonzalez, you have a right to
24 appeal this sentence. So if that's something you wish to do,
25 you certainly have the right to do that. Talk to your lawyer

1 about that.

2 You have two weeks to file a notice of appeal. That's
3 a pretty strict deadline so make sure that you guys discuss
4 whether you wish to file an appeal.

5 I want to stress what I said before. We spent a fair
6 amount of time on the guidelines and how they apply here. This
7 is a sentence I would have imposed, regardless of how the
8 guidelines crack up with respect to the cross-reference for
9 murder.

10 It seems to me that the facts of this case and what
11 the jury found and from the evidence I heard at trial support
12 this sentence, even if the guidelines were the ones that are
13 proposed or were proposed by Mr. Arthus.

14 Every case is based on the facts presented, and in
15 this case, I think this is an appropriate sentence. In any
16 event, if you wish to take an appeal, that's certainly your
17 right.

18 Is there something you wanted to say, Mr. Rehn?

19 MR. REHN: Yes, your Honor. Just so go back to when
20 you mentioned the 26-year term. I think you described it as
21 being a 26-year term on both counts concurrent.

22 THE COURT: It can't be that. You're right. It would
23 be 20 years on Count One and 6 years on Count Two. But it's
24 really going to be different once I know how much time he's
25 gotten credit for. So it will be probably more like 23 or 22

1 years, depending on what I learn.

2 MR. REHN: Yes, your Honor. I just wanted to make
3 sure it was clear.

4 THE COURT: I'm glad you reminded me of that. That's
5 right.

6 The supervised release will be concurrent. But the
7 others will be cracked up so that there is a consecutive
8 component. So it will be 20 plus whatever the balance of 26
9 minus time served is.

10 Is there anything else we should cover today,
11 Mr. Arthus?

12 MR. ARTHUS: In terms of a designation, a recommended
13 designation, we would just ask if the Court would recommend a
14 designation back to USP Canaan. He was doing well.

15 THE COURT: I'll make that recommendation in the
16 strongest possible terms. I can't order it, but I will
17 certainly make that recommendation.

18 Anything else from you, Mr. Rehn?

19 MR. REHN: No, your Honor.

20 THE COURT: Mr. Gonzalez, good luck to you. I wish
21 you continued success and to your family as well. Your
22 fortunate to have a family that cares about you and is here
23 for you today. That's not true of everybody.

24 Your victim's family obviously doesn't have that
25 luxury. Be mindful of that too. I accepted your statements of

1 remorse, I think and that shows a maturity that was factored
2 into the sentencing reduction. So good luck to you.

3 Let me thank the marshals, and let me thank the court
4 reporter as well.

5 (Adjourned)